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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 257.

LUCILLE A. BREECE, administratrix ad prosequendum of the Estate of Jerry C. Breece,
Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1. Where the substantive law of New Jersey applies and that law requires a direction of verdict or withdrawal of a case from the jury, or, in the alternative the setting aside of a verdict, and where, as here, there is an insufficiency of proofs to support the claim, did not the Court of Appeals properly reverse the judgment of the District Court and give judgment in favor of defendant?

2. Does not the action of the Court of Appeals conform with the decision of the courts of New Jersey, decisions of other courts of appeal and this Court?

Statement of the Case.

a. Introduction.

The State Highway Department of New Jersey, by contract (D Ex. 3; R377a, pertinent portions printed R418a-428a*) let to J. F. Chapman & Son, Inc., respondent herein, certain construction work in Bayonne, New Jersey, which included the relocation of buried fuel oil lines (R419a-426a). As a specialty item, this relocation was required to be subcontracted to a "pipeline subcontractor, who will construct the relocation under the supervision of the Engineer (State Highway Engineer, R252a-253a) and the owner (Bayonne Industries)" and had to be a member in good standing of the Pipeline Contractors Association, Dallas, Texas and "approved by the owner of the fuel oil lines" (D Ex. 3; R377a, Article 1.2.2, R419a, R251a-253a, R421a), with the "work of" their relocation "performed only by a pipeline subcontractor", with the prescribed "specific prequalification requirements" (D Ex. 3; R377a, R421a); the pipeline portion of the work consisted "of removal of four-8" fuel oil transmission pipelines and replacement with twin-12" pipelines" (D Ex. 3; R377a, Article 1.4.1, R420a), with details of work and the materials and methods, including "leakage testing" (D Ex. 3; R377a, R424a), to be employed particularly prescribed by the contract (D Ex. 3; R377a, R420a-426a); "Leakage testing to test the tightness of field joints" had to be "performed under a test pressure of 100 psi (pounds per square inch) held steady for 20 minutes" and could be performed on the entire lines or "limited to portions of the lines" at the

* Page references to the Record ("R") are to the Appendix filed with Respondent's Brief, as Appellant, in the Court of Appeals.

choice of the "subcontractor" (D Ex. 3; R377a, R424a); test pressure was to be supplied by compressed air and, when, by the choice of the "pipeline subcontractor", portions of the lines were to be tested, the "subcontractor" was to furnish the compressed air and gauges (D Ex. 3; R377a, R424a).

The subcontract for relocation of the pipelines, as required by the State Highway Department, was given to Construction Service Company (D Ex. 4, for identification—by consent not introduced into evidence R254a-255a; R11a-12a); the relocation work involved no other subcontractor (R15a) and was "a typical pipeline job" (R16a).

Petitioner's decedent (hereafter called "Breece") was Construction Service's "expert on the job" (R59a) and its job superintendent (R207a) or foreman (R334a).

During a leakage or "air" test of the lines (R306a), by Construction Service's employees, under the direction and control of Breece (R306a-307a, 332a, 335a), the subject accident occurred. Although Construction Service was required "to notify" the State Engineer and Bayonne Industries (owner of the pipelines) of the tests (R60a), testing was left by it "to the discretion and conduct of" Breece (R59a).

b. Issues at Trial.

While her complaint charged respondent with liability on the theories that it (1) had supplied defective equipment (First Count, par. 2, R3a) and (2) had "engaged in an inherently dangerous activity" (Second Count, par. 2, R4a), during trial, petitioner withdrew the first charge and any claim that respondent had exercised "control over

the activities of the Construction Service Company" and submitted her case only on the limited theory that respondent was liable because the work of the subcontract was "an inherently dangerous activity" (R375a-378a).

Respondent, in addition to a general denial, relied on the separate defenses of contributory negligence and assumption of risk (Answer, Second and Third Defenses, R7a).

c. Resume of Pertinent Proofs and Trial Proceedings.

1. Petitioner's Case.

The first step in Construction Service's required work was to dig a ditch (R16a-17a); the pipe came in 44 foot-lengths and 12 inches in diameter, was strung along the edge of and then placed in the ditch by a side mounted crane on a crawler tractor (R17a-18a); after the sections were welded together, material to prevent corrosion was applied to the joints (R18a); before backfilling the lines had to be tested, as aforesaid (R18a).

The double line of pipe was first tested (filled with 100 pounds of air psi for 20 minutes) when 1500 feet long (R18a). Each line was separately tested (R19a). At the time of the accident the lines were 3000 feet long,—tests were to be made at 1500 foot intervals (R19a). For testing, one end of the pipe was sealed and the other capped with a plug supplied with a pipe nipple through which air was admitted to the line (R20a), see P. Ex. 10 (R21a, R409a). The air came from a "standard" type compressor (R25a) located on ground level above the ditch (R23a-24a), and was transmitted to the line by a hose, purchased

(R32a) and owned (R31a) by Construction Service, attached to the nipple of the plug on the end of the line being tested (R21a-22a). This hose, "originally" a 50 foot piece "had been broken at some time in the middle and then spliced" (R32a), before it came "on the job" (R32a, 147a, 149a, 219a); the "splice" consisted of the hose ends having been slid over "a pipe with a nipple"—there was a two inch gap between the two hoses and you could see the metal pipe that was used to connect them (R149a) and clamps fastened the ends to the inserted pipe (R150a). At the time of the second test (when accident occurred) the hose was brought to the job from Construction Service's warehouse (R148a) and fastened to the pipeline by Construction Service's employees (R110a, 150a), who were aware of the splice (R110a), under Breece's supervision (R150a-151a).

Pressure in the pipeline was measured by a gauge attached to the nipple in the plug (R22a-23a) and admission of the air into the line was controlled by a gate-valve fastened to the plug (R37a-38a)—the type of valve used was "up to the discretion of" Construction Service, as the contractor "doing the job" (R66a).

At the time of accident, the ditch was 14-17 feet deep and 4-6 feet wide at the bottom (R28a, 93a) and shored with boards and supporting jacks (R28a, 95a-96a), as shown by P Ex. 12 (R27a, R413a). Ground and rain waters in the bottom of the ditch were variously estimated to have been 6-8 inches to 4 feet in depth, for which Breece "had pumps on the job with which he could remove water if it interfered with his operations" (R29a). The morning of the test, Breece inspected the pipelines and, finding water, had a pump obtained and had it "partly" pumped out by a

Construction Service employee, before starting the test (R142a-143a). The end of the ditch, where the test was being made, was sloped as to permit one to enter by walking down the slope (R29a, 93a, 96a, 101a).

While Breece was in the ditch, during the test and as compressed air was being sent into the line, the "splice" in the hose gave way; a broken end of the hose, from which air was escaping, struck Breece.

Petitioner's expert witness, Jerome Polaner, a professor of mechanical engineering, stated that the standard method of splicing requires a serrated pipe to be inserted into the hose ends to be joined a distance twice the inside diameter of the hose, with one or more clamps to fasten the ends to the pipe; as the use of plain pipe as an insert is not safe (R175a-177a). He believed plain pipe had been used to make the splice in the instant case (R187a-189a), but stated the clamps used were a type "used frequently in the field in splicing hose" (R185a).

Asked by the trial judge, if the use of a hose to convey compressed air to a pipeline, in a ditch, to obtain 100 psi pressure was "inherently hazardous or dangerous", Professor Polaner answered: "'Possibly'. The Court: 'Possibly; not inherently'. The Witness: 'That's correct'" (R190a). Asked if the testing of a "three thousand foot length of 12-inch pipe * * * by means of forcing a hundred pounds per square inch into the pipe * * * [assuming] that no check valve was used * * * that the operation * * * took place at the bottom of a trench that was approximately fifteen feet deep and anywhere from four to six feet wide * * * that the trench was supported by shoring that consisted of jacks pressing against pieces of wood

on the side of the trench and * * * that this air * * * was conducted into the * * * pipe by means of a fifty-foot piece of two inch inside diameter hose" was an "inherently dangerous operation", Polaner, pressed for a definitive opinion by the trial judge, stated that it was "possibly", as distinguished from "probably" or "inherently dangerous" (R190a-192a); he opined that it was only the use of an improperly spliced hose that was dangerous (R193a); pressed as to whether it was the "splice" in the hose which made the work dangerous, the trial court, observed that Polaner's "answer would be yes * * * he has already said that *if the tubing were not spliced and not weakened, then it was not inherently dangerous*" * (R198a-200a). Had it not been for Construction Service's failure to use serrated pipe to splice the hose, the work operation would have been "standard or customary" (R202a).

2. Respondent's Case.

Breece was "the field man" for Construction Service, in "charge" of inspection of the work (R281a). Construction Service used the compressor (R281a) and operated it through its employee, Barlics (R307a, 333a), who, the morning of accident, "made sure that the lines were secure at the compressor part, the hose, the air hose, and checked the machinery over and all to make sure that it was ready for running * * * It was" (R333a-334a) and, who, on orders from Breece, the job foreman, had started the compressor (R334a, 335a).

Breece and Raymond Max (state engineer's aide at the test) were in the trench when Barlics heard a "pop" and,

* Emphasis added.

as he "didn't know what it was from", he shut off the compressor (R337a). Breece came out of the trench and told Barlics more air was needed (R338a). Although told of the "pop", Breece said "that was nothing * * * to go over and start" the compressor again (R338a-339a), which Barlics did, as Breece was the "boss" (R339a). Ten minutes later there was "a loud noise like a blast" and the parted hose made a "hissing sound" as it whipped around in the trench (R339a, 340a, 343a).

3. Motions.

At the conclusion of petitioner's case, respondent moved for the entry of judgment in its favor on the grounds: the proximate cause of the accident was the claimed defective "splice in the hose—which was not respondent's nor in its control" (R226a, 229a); there was no showing that respondent had had knowledge of the claimed defect in the hose (R226a, 227a, 228a, 230a); Construction Service was a specialist, to whom the relocation of the pipelines had been given as required by respondent's contract with the State Highway Department (R231a); there was no showing that respondent was negligent in its selection or hiring of Construction Service; the mere superintendence by respondent of Construction Service's work for the purpose of seeing that the latter performed its undertaking did not constitute the exercise of such control as would disturb respondent's immunity for Construction Service's work performance (R232a-233a); Breece was an "expert" in the work (R231a); the proximate cause of the accident was the negligence of Construction Service and its employees (including Breece) in the performance of the contracted

work and in its supply and use of the defective hose and not the consequence of the work activity itself (R228a-230a, 234a); the contracted work activity itself was not inherently dangerous (R234a); and, Breece was not such innocent or third person as was the intended beneficiary of the "inherently dangerous activity" doctrine (R230a-231a). The motion was denied "at this time" (R249a).

At the conclusion of the entire case, respondent, again, moved for the entry of judgment in its favor, for the grounds earlier stated (R379a) and it further urged: Breece was not a third person or innocent bystander within the contemplation of the "inherently dangerous activity" doctrine, but the specialist and "boss", employed by Construction Service and charged with its performance of the contracted work activity (R380a); as conceded by petitioner's expert (Polaner), the work activity was not inherently dangerous and the accident had resulted only from the claimed improper splicing of the hose by Construction Service, a condition not caused nor brought about by respondent (R381a); the contracted work activity was not "inherently dangerous" *per se* and did not become so by reason of the negligence of Construction Service and its employees in the performance of their work. The trial judge without a determination of the motion (R385a), submitted the case to the jury (R390a-406a).

In the argument on the latter motion petitioner conceded: (a) that the accident was not caused by the depth of the trench (R383a), nor by its claimed proximity to a bridge abutment (R384a) and (b) that a work operation is not inherently dangerous for its negligent performance—petitioner limited her contention to the premise—"the test

is whether or not of itself the operation is of an inherently dangerous nature, of a nature to which necessarily there attaches great danger" (R384a).

4. Charge of Trial Court.

The pertinent portions of the instructions given the jury, which twice returned for further instruction (R402a, 404a), are:

> (a) Respondent's liability "depends on whether or not this operation was inherently dangerous" (R390a).
>
> (b) Adequate instructions related to respondent's denial that the work was inherently dangerous and the defenses of contributory negligence and assumption of risk (R390a, 391a, 392a, 395a, 396a, 397a).
>
> (c) Respondent's liability, if any, depended on findings that Construction Service had been negligent in the performance of an inherently dangerous operation (R397a).
>
> (d) "If an employee of [Construction Service] is negligent and that negligence is the proximate cause of the injuries sustained, and the work itself is inherently dangerous, then the negligence of the employee of [Construction Service] is attributable to the * * * defendant in this case." (R405a).

5. The Verdict.

The jury returned a verdict for petitioner against respondent, by a 10 to 2 vote (R406a).

6. Motions After Verdict.

Respondent moved to set aside the verdict and for entry of judgment in its favor in accordance with its motion for directed verdict, made at the close of the testimony on the grounds: petitioner had failed to establish a case sufficient to go to the jury (a) as to negligence on its part and (b) on the theory of "inherently dangerous activity" (R430a) and, in the alternative, moved the trial court to set aside the verdict and grant a new trial for the reasons that the verdict was against the weight of the evidence and the result of mistake, passion, partiality and prejudice (R430a).

On the hearing on the aforesaid motions, during which the trial court acknowledged that the case had been submitted only on the issue of "inherently dangerous operation" (R433a-434a), respondent urged the "subcontract" for relocation of the pipe lines was required by respondent's contract with the State Highway Department and was let to Construction Service as "experts" in that activity, with Breece as the expert in charge of the contracted work activity (R433a); petitioner's expert had limited himself to the contention that the contracted work was dangerous only because of the improper manner in which it was performed by Construction Service (R441a); the danger which caused the accident did not arise from the nature of the work to be done but from the use by Construction Service of an improper hose (R444a); the "inherently dangerous activity" principle applies only for the benefit of adjoining property owners or innocent bystanders and not to persons, such as Breece, who were not only interested in but in control of the very activity

(R444a-446a, 454a); and, the work activity had been performed at Breece's directions and within his discretion (R450a).

These motions were denied. (R456a, Memorandum, R463a).

7. Appeal to the Court of Appeals.

On respondent's appeal to the Court of Appeals, from the judgment entered on the verdict and the order denying respondent's motion to set aside the verdict and for a new trial, respondent contended: (a) the trial court had erred in its denials of respondent's motions for entry of judgment in its favor, made at the conclusion of petitioner's case, conclusion of entire case and after verdict, for the reasons that respondent had no status as respected the work activity out of which the accident arose, for which it had a duty of care which extended to Breece for its performance by Construction Service or its employees (including Breece) in a negligent manner; (b) its duty of care, if any, under its contract with the State Highway Department, was delegable under the proofs and law of the case and it was without liability to Breece, (1) as Construction Service, the independent contractor undertook the doing of the work without control over it by respondent, (2) the accident was not proximately the result of "inherently dangerous work operation", and (3) Breece, as the expert and boss in charge of the work and one to whom the asserted circumstances, dangers and risks were open, obvious, incidental to his employment and capable of appreciation, was not a person to whom the benefits of the "inherently dangerous activity" extended; (c) in the absence of any genu-

ine issue, as to any material fact the trial court erred in not entering judgment for respondent on its several motions; (d) "probability" and not "possibility" is the necessary quality of proof to sustain the asserted claim and verdict; (e) the jury disregarded or misunderstood, the trial court's instruction that petitioner could not recover if Breece "knew or should have known of the danger and in spite of that went ahead and assumed that risk" (R396a) or if Breece had been guilty of negligence which contributed to the happening of the accident (R395a); (f) that the exclusive inference permitted by the evidence was that Breece was or should have been aware of the asserted hazard and assumed same and, by acting as he did, was contributorily negligent; (g) the jury verdict was contrary to the weight of the evidence and the result of mistake, passion, partiality or prejudice; (h) the trial court so prejudicially erred in its instructions to the jury as to commit plain error.

The Court of Appeals, reversed the judgment of the trial court and directed the entry of judgment in favor of respondent (A1a-10a*). Following the established substantive law of New Jersey, which recognizes that the term "inherently dangerous" imports a danger which is incidental to and characteristic of the work itself and not one which arises from the means and methods of its performance, *Majestic Associates, Inc.* v. *Toti Contracting Co.*, 30 N. J. 425, 435, 153 A. 2d 321 (Sup. Ct. 1959), the Court of Appeals, from its review of the record, concluded (A9a-10a):

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* Page references to Opinion of Court of Appeals are to the Appendix to Petitioner's Petition.

"Under the proofs—all of them—the sole cause of the unfortunate accident was the parting of the poorly repaired breach in the hose. That improper repair stemmed not from the job itself but * * * from the causal or collateral negligence of persons engaged in it under particular circumstances.' Majestic Realty Associates, Inc. *v.* Toti Contracting Co., 30 N. J. at p. 435. It emanated * * * solely from the means and methods of its performance'. Idem. p. 435. And the person directly responsible for the improper repair was the Construction Service foreman and expert on the particular job. It was one or more of his men who made the repair. It was decedent himself who came out of the trench after the operator had stopped the compressor on hearing a 'popping' sound. It was the decedent who, being advised of the situation by the operator, concluded it was 'nothing' and instructed him to restart the compressor * * * none of the other job conditions entered into that happening. The use of the unfit hose by deceased for Construction Service cannot be attributed to the Chapman job. It was simply and entirely the means and method used by Construction Service through its foreman Breece in performing its own specialized work. "

Common sense, completely apart from deceased's skilled judgment, merely called for the use of sound hose, called for automatic rejection of defectively spliced hose. There has been no case in law or in justice of inherent danger proceeding from the use of the faulty hose, made out in the record * * * against the defendant."

In view of the above findings, the Court of Appeals had "no need" to pass on respondent's other points (A10a).

ARGUMENT.

Reasons in opposition to granting of the writ.

POINT I.

The decision of the Court of Appeals conforms with applicable State Law, decisions of other Courts of Appeal and this Court.

a. State Law.

In the absence of a genuine issue as to any material fact, the trial court must enter the judgment imposed in such circumstance. *Riley* v. *Weigand*, 18 N. J. Super. 66, 71, 86 A. 2d 698, 700-701 (App. Div. 1952); *Kaufman* v. *Pennsylvania R. R. Co.*, 2 N. J. 318, 324, 66 A. 2d 527, 529 (Sup. Ct. 1949); *Van Derbeck* v. *Conlon*, 41 N. J. Super. 574, 579, 125 A. 2d 531, 533 (App. Div. 1956). A verdict may properly be set aside as contrary to the weight of the evidence, even though the state of the evidence would not justify the direction of a verdict at the close of the proofs. *Franklin Discount Co.* v. *Ford*, 27 N. J. 473, 490, 143 A. 2d 161, 170 (Sup. Ct. 1958). A trial judge in passing on a motion for directed verdict may not weigh the evidence, but, in passing on a motion to set aside a verdict as against the weight of the evidence, must weigh the evidence to determine whether the verdict was one which might reasonably have been reached. *Mt. Adams & E. P. Inclined Ry. Co.* v. *Lowery*, 74 F. 463, 476 (6 Cir. 1896), cited with approval in *Franklin Discount*, *supra*, 490.

On appeal, the appellate tribunal may interfere and substitute its own judgment for that of the jury "if the verdict is so far contrary to the weight of the evidence as

to give rise to the inescapable conclusion of mistake, passion, prejudice or partiality". *Wytupeck* v. *Camden*, 25 N. J. 450, 466, 136 A. 2d 887, 896 (Sup. Ct. 1957). Also, *Colacurcio Contracting Corporation* v. *Weiss*, 20 N. J. 258, 262, 119 A. 2d 449, 452 (Sup. Ct. 1955): "* * * if there was no evidence to sustain the judgment, there is error in matter of law therein remediable on appeal * * *" *Kelly* v. *Forman*, 129 N. J. L. 41-42, 27 A. 2d 862 (Sup. Ct. 1942).

The trial judge and the Appellate Court "are controlled by the same criterion. The inquiry for each is whether the verdict is against the weight of the evidence * * *" *Hager* v. *Weber*, 7 N. J. 201, 212, 81 A. 2d 155, 160 (Sup. Ct. 1951).

b. Other Courts of Appeal.

Federal courts, in a diversity case (as here), should follow the sufficiency of evidence rule of the law of the forum. *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 166 F. 2d 908, 917, 918 (3rd Cir. 1948), certiorari denied 334 U. S. 846, 68 S. Ct. 1516; *Sampson* v. *Channell*, 110 F. 2d 754, 758 (1 Cir. 1940), certiorari denied, 310 U. S. 650, 60 S. Ct. 1099.

The right of federal courts to direct a verdict for insufficiency of evidence has been acknowledged in *Buffalo Insurance Company* v. *Spach*, 277 F. 2d 529 (5th Cir. 1960); *Peterson* v. *Exum*, 283 F. 2d 499, 502 (9th Cir. 1960); *Carter* v. *Schooner Pilgrim*, 238 F. 2d 702, 705 (1st Cir. 1956); *Sun Oil Co.* v. *Kneten*, 164 F. 2d 806, 809 (5th Cir. 1947).

c. This Court.

This court has reversed a court of appeals, which affirmed the trial court's denial of defendant's motions, not-

withstanding the verdict and for new trial, for insufficiency of proofs. *New York, New Haven and Hartford R. Co.* v. *Henagan*, 364 U. S. 441, 442, 81 S. Ct. 198, 199 (1960).

In *Johnson* v. *New York N. H. & H. R. Co.*, 344 U. S. 48, 73 S. Ct. 125 (1952), where, as here, the trial court reserved on defendant's motion for directed verdict and denied motions to set aside the verdict and to have judgment entered in accordance with defendant's motion for directed verdict and, in the alternative for new trial (Rules of Civil Practice) Rule 50(a) and (b), the Court of Appeals was held to have authority to enter judgment for defendant where a timely motion for judgment notwithstanding is made in the district court, as was done in the case now before the court.

The evidence must be sufficient to support the verdict, *Myers* v. *Reading Co.*, 331 U. S. 477, 485, 67 S. Ct. 1334, 1339 (1947) and, on a finding that the evidence was insufficient, the court of appeals has authority to direct a judgment of dismissal on the merits, *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 661, 55 S. Ct. 890, 891 (1934).

POINT II.

There is no reason for Certiorari.

Since the Court of Appeals did not render a decision in conflict with applicable state law, other courts of appeal, or depart from the accepted and usual course of judicial proceedings (S. Ct. Rule 19, 1(b)), and its decision is in conformity with decisions of this Court, there is no need for this Court to intervene and exercise its supervisory prerogatives.

Conclusion.

For the foregoing, the Petition for Writ of Certiorari should be denied and, if granted, respondent should be afforded opportunity to be heard on the "other points" raised, but not determined, on its appeal to the Court of Appeals.

Respectfully submitted,

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